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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	
	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as Amended	)	

COMMENTS OF INTERMEDIA COMMUNICATIONS INC.

INTERMEDIA COMMUNICATIONS INC.

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SUMMARY

Intermedia, in response to the Commission's FNRPM, respectfully submits that the rules adopted by the FCC in its Second Report and Order afford retail consumers the CPNI protection that Congress mandated in section 222 of the Act. Congress drafted section 222 with an eye toward balancing customer privacy and competition. Any rule that proscribes completely carrier use of CPNI for marketing would nullify the balance struck by Congress, run contrary to the plain language of the statute, and frustrate competition. Thus, Intermedia submits that the FCC should not issue any rule that could foreclose completely carrier use of CPNI for marketing.

At the same time, however, Intermedia believes that the Commission should implement special safeguards and enforcement mechanisms to protect competitor CPNI from ILEC abuse. Because ILECs are retail service providers, wholesale service providers, and the executors of presubscription databases, ILECs have unique access to the CPNI of essentially every consumer within each ILEC's service territory. To guard against potential ILEC misuse of these rich CPNI data sources, the Commission should mandate that the ILECs maintain bright-line separations among retail, wholesale, and presubscription operations. As for enforcement, the FCC should treat ILEC winback campaigns that misuse CPNI similar to interexchange carrier slamming.

As to the FBI's concern about "foreign storage of, and access to, domestic CPNI," Intermedia feels that the FCC's existing rules guard against foreign abuse of CPNI to the extent practicable. Additionally, Intermedia submits that issues related to law enforcement access to CPNI are beyond the scope of this proceeding and section 222 of the Act, as section 222 contemplates the customer-carrier relationship, and not law enforcement access to CPNI.

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COMMENTS OF
INTERMEDIA COMMUNICATIONS INC.

Intermedia Communications Inc. ("Intermedia"), by its counsel, hereby submits its comments to the Federal Communications Commission's ("FCC" or "Commission") Second Report and Order in the above captioned docket.[1]

I. INTRODUCTION

Intermedia is one of the country's largest and fastest growing competitive local exchange carriers, providing a full range of local and long distance services to business and government end-user customers, long distance carriers, information service providers, resellers, and wireless carriers. Intermedia is known for its ability to package customized, "no assembly

[1] Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (rel. Feb. 26, 1998) ("Second Report and Order" or "FNPRM").

required" solutions to meet customer-specific needs. Intermedia provides voice, video, and data services, including frame relay and Internet access, to customer locations in over 1,200 cities nationwide and internationally – offering seamless end-to-end connectivity virtually anywhere in the world.

The Commission's FNPRM requests comment on three issues: (1) whether customers may restrict carrier use of customer proprietary network information ("CPNI") for all marketing purposes; (2) whether additional safeguards and enforcement mechanisms are necessary; and (3) whether special rules are needed to govern "foreign storage of, and access to, domestic CPNI." In response, Intermedia, by these comments, demonstrates that:

(1) The rules adopted by the FCC in its Second Report and Order afford retail consumers the CPNI protection mandated by Congress, including the general protection provided by section 222(a) of the Telecommunications Act[2];

(2) The Commission should adopt rules to protect against incumbent local exchange carrier ("ILEC") abuse of competitor CPNI that may result from the conflict of interest inherent in the ILECs' roles as retail provider, wholesale provider, and custodian of consumer presubscription databases; and

(3) The FBI's concern about "foreign storage of, and access to, domestic CPNI," is satisfied to the extent practicable by the FCC's existing rules, and issues related to law enforcement access to CPNI are beyond the scope of this proceeding and section 222 of the Act.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. §§ 151 et seq.) ("the Act").

II. THE RULES ADOPTED IN THE SECOND REPORT AND ORDER PROTECT CONSUMERS' CPNI RIGHTS

In its FNPRM, the Commission noted that "[s]ection 222 ... is silent on whether a customer has the right to restrict a telecommunications carrier from using" CPNI for any and all marketing uses.[3] While the statute may lack explicit language on this issue, it clearly envisions that carriers will have the ability to use CPNI for some marketing uses. Any interpretation of the statute that restricts completely a carrier's use of CPNI for marketing would go directly against Congressional intent, the structure of the statute, and sound policy.

A. Congress intended to allow carriers to use CPNI for some marketing purposes

The Commission has already acknowledged that the Act expressly provides for some marketing uses of CPNI. In assessing the underlying goals of the CPNI protections, the Commission found that "Congress intended neither to allow carriers unlimited use of CPNI for marketing purposes..., **nor restrict carrier use of CPNI for marketing purposes altogether**."[4] Indeed, Congress set out a "comprehensive new framework ..., which balances principles of privacy and competition in connection with the use and disclosure of CPNI and other customer information."[5] Congress' express effort to balance "privacy and competition" suggests that carriers have a statutory right, albeit it a limited one, to use CPNI for marketing. Thus,

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3 Second Report and Order at ¶ 204.

4 Id. at ¶ 37 (emphasis added). "Congress further admonishe[d] that '[i]n the new section 222(c), the use of CPNI by telecommunications carriers is limited, except as provided by law or with the approval of the customer.'" Id. (emphasis in original) (citing Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996)).

5 Id. at ¶ 14.

construing section 222 to foreclose completely carrier use of CPNI for marketing purposes would cut directly against the balance Congress sought to achieve.

B. Complete proscription would nullify the plain language of section 222, which expressly permits carrier use of CPNI for some marketing purposes

Section 222 plainly carves out areas in which carriers may use CPNI for marketing. Reading section 222 using the principle of statutory construction that the "specific governs the general"[6] reveals that section 222(a) sets out a general duty of carriers to "protect the confidentiality of proprietary information."[7] Section 222(c)(1) carves out two specific exceptions to this general duty: (1) "the right to use or disclose CPNI for ... marketing related offerings within customers' existing service"[8] and (2) the right to use CPNI for providing non-telecommunications service, such as directory publishing.[9]

As the Commission asserted, section 222(c)(1) requires carriers to obtain customer approval only "when they seek to use, disclose, or permit access to CPNI for purposes **beyond** those specified in sections 222(c)(1)(A) and 222(c)(1)(B)."[10] For the specific carrier-use exceptions that Congress crafted in sections 222(c)(1)(A) and 222(c)(1)(B) to have any meaning,

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6 Id. at ¶ 160.

7 47 U.S.C. § 222(a). Section 222(a) provides:

> In general. —Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufactures, and customers, including telecommunications carriers reselling telecommunications services provided by a telecommunications carrier.

8 Second Report and Order at ¶ 35 (interpreting section 222(c)(1)(A)).

9 Id. at ¶ 45 (interpreting section 222(c)(1)(B)).

10 Id. at ¶ 53 (emphasis added).

these sections must limit the general protection provision laid out in section 222(a). As such, any interpretation of section 222 to prevent completely carrier use of CPNI for marketing purposes would nullify specific statutory exceptions to the general provision of CPNI protection – an outcome that cannot be supported under the rules of statutory construction.

C. Any complete proscription is not necessary to protect customer privacy concerns, would deny customers valuable information, and would impose unnecessary burdens on carriers

Within the parameters of the FCC's total service approach, sound policy also favors allowing carriers to use CPNI for marketing services to customers. Congress enacted the CPNI protections to balance "privacy and competition," and a carrier cannot compete if it cannot make its customers aware of special promotions or new features related to the customer's existing service.

As the Commission has noted, customers "expect that carriers ... will use information derived through the course of that relationship [, i.e., CPNI,] to improve the customer's existing service."[11] Indeed, competition demands that carriers have the ability to design products to meet their customers' needs and to inform customers of new product offerings that may enhance existing service arrangements. Doing so requires use of CPNI. As the Commission itself found, the carrier-use exceptions (sections 222(c)(1)(A) and 222(c)(1)(B)) "evidence[] Congress' understanding that customers desire their service to be provided in a convenient manner, and are willing for carriers to use their CPNI without their approval to provide them service ... within the parameters of the customer-carrier relationship."[12] The record, therefore, demonstrates that use of CPNI is necessary to provide critical service and

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11 Id. at ¶ 54.

12 Id.

network information to consumers, and that competition requires that carriers have the ability to inform existing customers of service improvements within the bounds of the existing customer relationship.

Additionally, any absolute proscription on carriers using CPNI would be unduly costly for carriers. Under the existing CPNI rules, carriers already have to segregate their customer databases and reconfigure their systems in order to limit marketing uses of CPNI. Any rule that allows for complete proscription of CPNI use for marketing would force carriers to complete another round of costly operational changes even though, as the Commission has found, "customers do not expect that carriers will need their approval to use CPNI for offerings within the existing total service to which they subscribe."[13] Compounding systems issues, limits on using CPNI for marketing could effectively prohibit a carrier's ability to advertise through billing inserts – the most cost effective means of informing customers of service enhancements. Thus, any rule that completely prevents carriers from using CPNI for marketing seems unduly burdensome and contrary to the balancing of "privacy and competition," which lies at the heart of the Act's CPNI protections.

In sum, "Congress recognized ... that customers expect that carriers with which they maintain an established relationship will use information derived through the course of the relationship to improve the customer's existing service."[14] Congress intended at least some marketing use of CPNI, as section 222 expressly permits carrier use of CPNI for marketing in some instances. Additionally, sound policy requires that the Commission protect some carrier

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13 Id. at ¶ 55.

14 Id. at ¶ 54.

use of CPNI for informational marketing purposes. For all of these reasons, the Commission should refrain from action that completely forecloses carrier use of CPNI for marketing.

III. THE COMMISSION SHOULD ADOPT SAFEGUARDS AND ENFORCEMENT MECHANISMS TO PROTECT COMPETITORS' CPNI FROM ILEC ABUSE

The FCC has stated that it is "cognizant of the danger[] ... that incumbent LECs could use CPNI anticompetitively."[15] Recognizing this danger, the Commission should adopt safeguards to mitigate the chance of ILEC abuse of competitor CPNI and adopt enforcement mechanisms to ensure ILEC compliance with safeguards. Section 222(a) requires carriers to protect the proprietary information to which they have access. Because ILECs have access to a wide variety of competitor CPNI, the Commission should require the ILECs to implement specific measures that protect competitors' CPNI from potential ILEC abuse.

A. ILECs have a unique conflict of interest that creates a heightened risk of CPNI abuse

ILEC monopolists, though now subject to competition, perform three roles that create an irreconcilable conflict of interest and a high potential for CPNI misuse. First, ILECs provide retail service to the overwhelming majority of customers in their service areas. Second, ILECs provide wholesale service – including bottleneck services and facilities, such as collocation, interconnection, and unbundled network elements – to competitors who serve former ILEC customers. Third, ILECs maintain presubscription databases that identify nearly every customer's interLATA, intraLATA, and local exchange carrier. In each of these roles, ILECs obtain volumes of CPNI on their retail customers and on their competitors' customers. With valuable information on competitor customers literally at the ILECs' fingertips, ILECs have a

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15 Id. at ¶ 59.

strong incentive to misuse the CPNI received in wholesale and presubscription activities to aid the ILECs' retail marketing interests. The Commission has recognized that, in processing presubscription changes for interexchange carriers, an ILEC generates CPNI that could be used by its own marketing department to provide competing service.[16] ILECs are in a position to benefit from similarly valuable customer data every time they process a competitor's order for resale or unbundled network elements.

Moreover, as competition takes hold, ILECs will increasingly lose market share, and the greater the loss of market share, the greater the temptation to use competitor CPNI to "winback" former ILEC customers. To protect consumers and competition, the Commission should impose specific restrictions on ILEC use of CPNI databases to limit the danger of CPNI misuse that could result from the ILECs' unique position as retailer, wholesaler, and caretaker of presubscription databases.

B. Safeguards and enforcement mechanisms are needed to mitigate the likelihood of ILEC abuse of competitor CPNI

The Commission should mandate that ILECs maintain a bright-line separation between ILEC retail operations, wholesale operations, and their presubscription operations. This firewall approach would prevent anticompetitive access by the ILEC retail arm to the CPNI contained in wholesale and presubscription systems. The ILECs currently maintain separate

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16 See id. ("[the Commission is] cognizant of the dangers ... that incumbent LECs could use CPNI anticompetitively); see also, Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996: Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, 12 FCC Rcd 10674, 10684 Further Notice of Proposed Rulemaking and Memorandum and Opinion Order on Reconsideration (1997) ("A related concern is that a [presubscription] change may lead [an ILEC] to engage in conduct that blurs the distinction between its role as executing carrier and its objectives as a marketplace competitor.").

operations support systems for their retail and wholesale operations. Indeed, in the interLATA relief proceedings, conducted under section 271 of the Act – both before the Commission and state regulatory bodies – ILECs have made it clear that they employ entirely separate systems for processing customer orders for their retail services and for processing competitive carrier requests for resale, interconnection, collocation, and unbundled network elements. The Commission can establish effective protections against anticompetitive abuse of CPNI simply by prohibiting the transfer of information between the account representatives, other personnel, and operations support systems that service retail and wholesale customer databases,

Restrictions on ILEC use of competitors' CPNI must be accompanied by strict enforcement measures. As the FCC found, the Act does not permit "the former (or soon-to-be former) carrier to use the CPNI of its former customer (i.e., a customer that has placed an order for service from a competing provider) for 'customer retention' purposes."[17] Consequently, a carrier is precluded from using or accessing CPNI derived from the provision of local exchange service (i.e., to regain the business of a customer that has chosen another provider). ILECs, through their control of presubscription, retail, and wholesale CPNI databases, have the capability to monitor the carrier-client relationship of essentially every consumer, business and residential, within the ILEC service territory. Persuasive evidence suggests that the ILECs have used service change CPNI to trigger winback campaigns to reclaim customers lost to competitors. The Commission should thus focus on identifying and preventing ILEC winback campaigns that employ misappropriated competitor CPNI.

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17 Second Report and Order at ¶ 65.

Intermedia believes that the Commission should treat ILEC winback campaigns that employ misused CPNI similar to interexchange carrier "slamming." Throughout this proceeding, the Commission has analogized CPNI abuse to slamming,[18] and Intermedia submits that the analogy is appropriate for designing enforcement mechanisms. As with slams, if a carrier can make a prima facie case (e.g., through a customer or whistleblower statement or winback promotional material) that an ILEC has inappropriately used CPNI to engage in winback, then the Commission should issue a Notice of Apparent Liability as described in FCC rules.[19] Moreover, because of the serious anticompetitive effect of CPNI abuse, Intermedia believes that fines should match those for slams – $40,000 per violation.[20] Intermedia views ILEC winback campaigns that misuse CPNI to be as potentially damaging a slamming, and thus feels that the Commission should employ similar enforcement tools to protect customers and carriers.

IV. THE COMMISSION'S EXISTING RULES SATISFY THE FBI'S REQUEST TO THE EXTENT PRACTICABLE UNDER THE ACT'S CPNI PROVISION, SECTION 222

The FBI has two basic concerns: (1) that foreigners may gain access to CPNI and (2) that a company may store CPNI in a foreign location, such that U.S. law enforcement may have difficulty accessing the CPNI if it is needed for a law enforcement investigation. In response to these concerns, Intermedia maintains that the Commission's existing rules, which limit the use of CPNI to the existing carrier-customer relationship, satisfy the FBI's concern about foreign access to CPNI. Regarding U.S. law enforcement access to foreign-stored CPNI,

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18 See e.g., id. at ¶ 139 ("We note that this requirement is similar to the one we adopted in the context of letters of agency for PIC changes.").

19 47 CFR § 1.80 (1997).

while Intermedia understands the FBI's desire for ready access to CPNI, special record keeping requirements created solely to make CPNI available to law enforcement go beyond the scope of section 222, which is concerned solely with the carrier-customer relationship, not law enforcement access to customer records.

The FBI seems concerned that foreigners could use domestic CPNI as a means of espionage. While the effectiveness of using the "CPNI of U.S. governmental officials ... as 'blackmail'"[21] is unclear, at least to Intermedia, the rules adopted by the FCC already restrict this type of activity to the extent practicable. The Act's CPNI provisions require "carriers to obtain customer 'approval' when they seek to use, disclose, or permit access to CPNI ... [, and, by] requiring that carriers obtain approval, Congress ensured that customers would be able to control any 'secondary' uses to which carriers could make of their CPNI, and thereby restrict the dissemination of their personal information."[22] Nothing prevents a U.S. citizen from accessing foreign Internet sites or making calls to foreign service providers that require customers to provide CPNI, such as credit card information. By proscribing secondary uses of CPNI, the FCC's rules offer consumers protection to the greatest extent practicable.[23]

U.S. law enforcement access to CPNI, regardless of whether the CPNI is stored domestically or abroad, goes beyond the scope of section 222. The purpose of the Act's CPNI

(...continued)

20 Id. at § 1.80(b)(4).

21 Second Report and Order at ¶ 208 n.710 (quoting FBI ex parte (filed Jul. 9, 1997) at 8 n.17 and n.18).

22 Id. at ¶ 53.

23 Significantly, domestic CPNI is already accorded a higher level of protection than is accorded CPNI by many foreign entities.

provision is to "balance both competitive and consumer privacy interests with respect to CPNI"[24] used in the customer-carrier business relationship. Neither competitive interests nor privacy interests will be served through the record keeping requirements sought by the FBI. Indeed, the FBI's approach would undermine section 222's balancing approach by harming competition through unnecessarily burdensome regulatory requirements.

V. CONCLUSION

For the foregoing reasons, Intermedia has shown: (1) any complete prohibition on carrier use of CPNI for marketing would go against Congressional intent, the plain language of the statute, and sound competition policy; (2) special safeguards and enforcement measures are needed to mitigate the danger of ILEC misuse of competitor CPNI contained in ILEC wholesale and presubscription databases; and (3) existing CPNI rules guard against the "secondary use" concerns of the FBI, and any additional record keeping requirement for law enforcement access to CPNI is beyond the scope of the Act's CPNI provision, section 222.

Respectfully submitted,

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March 30, 1998

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[24] Joint Explanatory Statement at 205, supra note 4.

CERTIFICATE OF SERVICE

I herbey certify that I have, this 30th day of March, 1998, served this day a copy of the foregoing COMMENTS OF INTERMEDIA COMMUNICATIONS INC. by hand delivery to the following:

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